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No. 04-1384

In the

Supreme Court of the United States

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF JOHN A. RAPANOS AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS JUNE CARABELL, ET AL.

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QUESTIONS PRESENTED

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the "waters of the United States?"

2. Do the limits on Congress' authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the "waters of the United States?"

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE PETITION 4

I. THE CIRCUIT COURTS OF APPEALS ARE SPLIT SHARPLY OVER THE MEANING OF THIS COURT'S DECISION IN *SWANCC* 4

II. THIS CASE PRESENTS A NATIONAL QUESTION OF VITAL IMPORTANCE 9

A. The Uncertainty and Overly Broad Application of the CWA Harms Industry, Agriculture, Local Government, and Ordinary People 9

1. Inconsistent Application of the Clean Water Act Poses Substantial Problems for Companies and Industries Operating Nationwide 9

2. Inconsistency and Overly Broad Application of the Clean Water Act Costs the Economy Billions and Negatively Impacts Consumers and Home Buyers 10

3. Overly Broad Application of the Clean Water Act Harms Farmers, Ranchers, and Small Property Owners 12

TABLE OF CONTENTS—Continued

Page

B. The Uncertainty and Overly Broad Application of the Clean Water Act Harms Local Governments and Invades Traditional Local Power over Land Use Planning 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers (9th Cir. Docket No. 03-16586) ... 5

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TABLE OF AUTHORITIES—Continued

Page

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Statutes

7 U.S.C. § 2301 12

33 U.S.C. § 1251(b) 16

Fla. Stat. Ann. § 187.201(15)(b)(3) (West 2005) 16

Rules

Sup. Ct. R. 37.2 1

R. 37.6 1

TABLE OF AUTHORITIES—Continued

Page

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Page

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Page

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2, John A. Rapanos and Pacific Legal Foundation respectfully submit this brief amici curiae in support of the Petition for Writ of Certiorari. Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

John A. Rapanos owns several parcels in Bay County, Michigan. In an effort to develop his property for commercial use, he cleared and graded some of the property. *See United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002). Though his parcels lie approximately twenty miles from the nearest navigable waterway, the United States asserted jurisdiction over the property and Mr. Rapanos was prosecuted for discharging fill into "waters of the United States" without a permit. *See id.* Mr. Rapanos was tried and convicted, fined $185,000, and sentenced to three years probation. *See id.* at 1013. The conviction was upheld on appeal, but this Court granted a writ of certiorari, vacated the conviction, and remanded the case back to the Sixth Circuit for a determination consistent with *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*). *See Rapanos v. United States*, 533 U.S. 913 (2001).

On remand, the district court found that federal jurisdiction was improper after *SWANCC*, *see United States v. Rapanos*, 190 F. Supp. 2d at 1017, but the Sixth Circuit reversed that determination and further directed the trial court to increase the sentence to include a minimum of ten months in prison. *See United States v. Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003). This Court denied Mr. Rapanos's subsequent

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

petition for a writ of certiorari, along with two similar cases. *See Rapanos v. United States*, *cert. denied*, 541 U.S. 972 (2004); *see also Newdunn Associates, LLP v. United States Army Corps of Engineers*, *cert. denied*, 541 U.S. 972 (2004); *Deaton v. United States*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). After Mr. Rapanos's case was remanded to the district court for sentencing, this Court issued a decision invalidating the United States Sentencing Guidelines. *See United States v. Booker*, 125 S. Ct. 738 (2005). The trial court then reinstated Mr. Rapanos's original fine and probation and the United States appealed that decision, ushering in the 13th year of this litigation. In 1994, in addition to the criminal penalties, the government filed civil charges against Mr. Rapanos seeking as much as $13 million in fines and mitigation. Mr. Rapanos again objected to the government's application of the Clean Water Act to the remote nonnavigable wetlands on his property, but the Sixth Circuit affirmed his liability on the same rationale that supported the criminal case. Mr. Rapanos filed a pending petition for writ of certiorari with this Court and thus has a significant stake in the determination of this case. *See Rapanos v. United States*, Docket No. 04-1034.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit, public interest law foundation of its kind. PLF litigates in support of the rights of individuals to make reasonable use of their private property and advocates a balanced approach to environmental issues. PLF supports the concept of limited government, the appropriate balance between federal and state power, and the principle that the environment must be protected in a manner that is consistent with other needs of society.

PLF has participated before this Court on several occasions involving interpretations of the jurisdictional reach of the Clean Water Act (CWA). For example, PLF participated as amicus curiae in *SWANCC*, 531 U.S. 159, and *United States v.*

Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). PLF attorneys also represent John A. Rapanos on his petition before this Court which raises issues that are nearly identical to those in this case. *See Rapanos v. United States*, Docket No. 04-1034. PLF attorneys have also offered nonpartisan testimony before Congress on the scope of federal jurisdiction under the Clean Water Act. *See* Statement of M. Reed Hopper to the House Committee on Government Reform, Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs: Federal Authority to Require Wetlands Dumping Permits, 2002 WL 31123945 (Sept. 19, 2002). PLF's experience in this area will provide an additional, valuable, and informed viewpoint on the issues presented in this case

SUMMARY OF ARGUMENT

Since this Court's decision in *SWANCC* affirmed clear limits to the term "navigable waters" under the Clean Water Act (CWA or Act), there has been sharp disagreement about the permissible scope of federal jurisdiction over wetlands and other nonnavigable waters. The federal courts are in open disagreement, having split into two basic camps: One applying the so-called "any hydrological connection" test, approves application of the Act to any mudflat, stream, or pond that might, through a series of other waters, share an attenuated connection with a traditional navigable water. *See United States v. Rapanos*, 339 F.3d at 452. Other courts limit the Act to navigable waters and nonnavigable waters that are immediately adjacent to and inseparably bound up with navigable waters. *See In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (designating *Rapanos* as "unsustainable under *SWANCC*").

This dispute results in inconsistent applications of the CWA, depending only on the circuit court in which one's case is heard. Worse, property owners in circuits that have not yet picked sides in this dispute are trapped in the untenable position

of submitting to illegal government action or risking heavy fines and prison time to discover which rule will be adopted. Further, the widespread confusion, inconsistency, and over-broad application of the CWA creates serious problems for industries that must operate in multiple circuits and damages other vital industries such as agriculture. Finally, the circuits adopting the "any hydrologic connection" test permit profound federal intrusion into the quintessentially local function of land use planning.

Despite repeated attempts, the Congress, the Administration, and the Executive Agencies charged with implementing the statute have failed to create a uniform rule. This Court remains the only institution capable of resolving the conflict and putting an end to the disorder commonplace in this area for the past four years. This Court should grant the petition for certiorari to resolve the conflict among the federal courts and to provide national coherence and uniformity in the operation of the Clean Water Act.

REASONS FOR GRANTING THE PETITION

I

THE CIRCUIT COURTS OF APPEALS ARE SPLIT SHARPLY OVER THE MEANING OF THIS COURT'S DECISION IN *SWANCC*

In 2001, this Court issued its decision in *SWANCC*, outlining the limits of the application of the CWA. And while all courts agree that *SWANCC* articulated *some* limits to the reach of the CWA, the federal courts of appeals disagree sharply over just what those limits are. In the Fifth Circuit, for example, a discharge of a pollutant into a nonnavigable water is subject to regulation only if the pollutant reaches a water that is both immediately adjacent to and inseparably bound up with a navigable water. *See In re Needham*, 354 F.3d at 345.

The Fourth Circuit, however, finds a violation of the CWA if there is any discharge into a water, without a permit, that is hydrologically connected to a truly navigable water; that is, a person is guilty of a CWA violation for filling a wetland adjacent to a ditch that takes a "winding, thirty-two-mile path" through several nonnavigable, man-made watercourses even though the fill material never leaves the original site. *Deaton v. United States*, 332 F.3d at 702. The Ninth Circuit has addressed the issue, but its rule is unclear and presently the subject of three appeals. *See Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers* (9th Cir. Docket No. 03-16586); *San Francisco Baykeeper v. Cargill Salt Division* (9th Cir. Docket No. 05-15051); *City of Healdsburg v. Northern California River Watch* (9th Cir. Docket No. 04-15442). In the decision below, the Sixth Circuit staked out the broadest position on CWA jurisdiction thus far: a person who discharges into a hydrologically isolated wetland is subject to the severe civil and criminal penalties of the Clean Water Act if that wetland, though isolated, is in the general vicinity of another water that shares an eventual hydrologic connection to a navigable water. *See Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 708 (6th Cir. 2004). Only this Court can resolve the conflict and confusion over the scope of the CWA. The circuits openly acknowledge, but show no sign of resolving, their sharp disagreement. The Fifth Circuit derided the decisions in the Fourth and Sixth Circuits as "unsustainable under *SWANCC*." *Needham*, 354 F.3d at 345. The court below in this case also expressly recognized the conflict, explaining the differences between the "minority of courts," which apply *SWANCC* broadly, and the "majority of courts," which limit *SWANCC* to its facts. *See Carabell*, 391 F.3d at 709.

Lower courts in other regions must choose from among these conflicting opinions. Property owners and other potential defendants have no way to assess the legality of their conduct,

and practicing attorneys are unable to give trustworthy advice to their clients. *See* Philip J. Weiser, *Justice White and Judicial Review*, 74 U. Colo. L. Rev. 1305, 1311 (2003) (explaining that Circuit conflicts and unclear law "confuse[] lower courts and practicing attorneys"). The bottom line is that the same federal law means dramatically different things depending on where one's property is located. Filling wetlands without a permit 20 miles from a navigable water is perfectly legal in Mississippi but results in jail time in Michigan; conduct that is free from federal regulation in New York requires a permit in North Carolina. But at least citizens residing in the twelve states making up the Fourth, Fifth, and Sixth Circuits can be reasonably sure what the rule is; whereas the 56 million residents in the nine states and two territories of the Ninth Circuit know only that their conduct *might* land them in jail. *See Creating Additional Federal Court Judgeships*, 150 Cong. Rec. H8048, H8055, 2004 WL 2237300 (Statement of Rep. Simpson) (Oct. 5, 2004).

Litigants, regulators, and property owners in the eight other federal circuits simply have no practical means of telling which test will be applied to them. Risking jail time and serious civil penalties is the only way to determine whether the CWA will apply to one's conduct. A property owner in Northwest Alabama can look a few miles West to Mississippi and the Fifth Circuit's narrow rule or a few miles North to Tennessee and the Sixth Circuit's broad rule, but one must wait for a case to make its way to the Eleventh Circuit, rely on bureaucratic assurances, or proceed without a permit, risking considerable fines and prison.

A recent GAO report confirms the confusion, explaining that the Army Corps' local districts "differ in how they interpret and apply the federal regulations when determining what wetlands and other waters fall within the [Clean Water Act's] jurisdiction." U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District*

Office Practices in Determining Jurisdiction 3 (Feb. 2004), *available at* www.gao.gov/new.items/d04297.pdf (last visited May 2, 2005) (hereinafter *GAO Report*). Worse than the inter-district disagreements are the *intra*district inconsistencies: the GAO report concludes that even Army Corps staff working in the same office cannot agree on the scope of the CWA, explaining that "three different district staff" would likely make "three different assessments" as to whether a particular water feature was subject to the Clean Water Act. *GAO Report* at 22. Observers have concluded that there is "confusion" and "no guidance," such that "[n]o one knows what is protected and what isn't." Cindy Skrzycki, *Definition of 'Ditch' Is Muddy at Best*, The Washington Post, Mar. 29, 2005, at E1, *available at* 2005 WLNR 4921280. Or as one expert put it," '[t]here is just pandemonium out there.' " *Id.* (quoting Julie Sibbing, senior program manager for wetlands policy for the National Wildlife Federation). The property owners and others subject to the CWA, are left to the whim of whatever government agent reviews their project.

Even the Executive Branch recognizes that it is applying the CWA inconsistently, but has nevertheless failed to resolve the problem. The Army Corps and the Environmental Protection Agency issued an "Advance Notice of Proposed Rulemaking" to clarify the scope of federal jurisdiction under the Act and asked for public comment on the meaning of the *SWANCC* decision. 68 Fed. Reg. 1991 (Jan. 15, 2003). But when a copy of the draft language for the future regulation was "leaked" in November, 2003, *see* Bob Marshall, *USFWS Contradicts Administration's Plans*, New Orleans Times-Picayune, Dec. 7, 2003, at 16, *available at* 2003 WLNR 2076955, the administration withdrew the proposed rulemaking altogether. *See White House Backs Off on Wetlands Issue*, Wall St. J., Dec. 17, 2003, at B6, *available at* 2003 WLNR 3116291 ("Bowing to criticism from Congress and the public, the Bush

administration is backing away from a proposal that would have weakened federal jurisdiction over some U.S. wetlands.").

Congress held hearings on the impact of the *SWANCC* decision but has never reached any conclusion or solution. *See, e.g.*, Statement of M. Reed Hopper, *supra*. Some Members of Congress introduced several bills attempting to resolve the post-*SWANCC* conflict over the scope of the Clean Water Act but none of these has made it out of Committee. *See* Clean Water Authority Restoration Act of 2005 S.912, 109th Cong. (1st Sess. 2005) (referred to Committee); Clean Water Authority Restoration Act of 2003 S.473, 108th Cong. (1st Sess. 2004) (referred to Committee); Federal Wetlands Jurisdiction Act of 2004, H.R. 4843, 108th Cong. (2d Sess. 2004) (referred to Committee). The members introducing these bills consistently explain that "confusion over the interpretation of the *SWANCC* decision has grown," caused in part by the "wide variety of interpretations by EPA and Corps officials." Statements on Introduced Bills and Joint Resolutions, 151 Cong. Rec. S4400 (Apr. 27, 2005) (Statement of Sen. Feingold).

Congress has failed, the Administration has failed, and the agencies charged with administering this statute have failed to clarify CWA jurisdiction. The lower federal courts cannot agree, thus leaving this Court as the only body capable of settling the conflict and ending the confusion. *See* Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. St. B.J. 346, 349 (1982) (explaining that the "principal task of the [Supreme] Court is to provide some degree of coherence and uniformity in federal law throughout the land").

II

THIS CASE PRESENTS A NATIONAL QUESTION OF VITAL IMPORTANCE

A. The Uncertainty and Overly Broad Application of the CWA Harms Industry, Agriculture, Local Government, and Ordinary People

1. Inconsistent Application of the Clean Water Act Poses Substantial Problems for Companies and Industries Operating Nationwide

National industries like home building and oil production suffer from increased regulatory costs and uncertainty in that they are forced to conform to different readings of the same federal law for each operation, depending on where it is located. The oil industry, for example, produces over 7 million barrels of oil per day from over 500,000 wells nationwide, with the largest concentration of wells in Alaska, California, Texas, Louisiana, Oklahoma, and Wyoming. *See* U.S. Department of Energy, *United States Country Analysis Brief, available at* http://www.eia.doe.gov/emeu/cabs/usa.html#oil (last visited May 3, 2005). A company operating in each of these jurisdictions has to apply the divergent rules for the Ninth and Fifth Circuits, while somehow divining what the rule might be in the Tenth Circuit.

Nationwide home builders are also forced into the difficult position of complying with varying interpretations of the CWA as they operate from circuit to circuit. Forcing home builders to protect themselves by applying for permits that they may not need drives up costs, decreases production, and delays construction. Not surprisingly, consumers and home buyers are the ultimate victims of this patchwork scheme. A recent study indicates that it costs an *average* of more than $271,000 to

prepare an individual fill permit, while a nationwide permit application costs nearly $30,000 to prepare. *See* David L. Sunding & David Zilberman, *Non-Federal and Non-Regulatory Approaches to Wetland Conservation: A Post*-SWANCC *Exploration of Conservation Alternatives* at 7 (Jan. 2003), *at* http://www.housingandenvironment.org/Text%20Files/Wetlands_Final.PDF (hereinafter *The Sunding Permitting Study*). These costs cover only labor costs and fees; they ignore the more significant and inevitable costs associated with project delay and reduction. *See id.* The study also reveals that it takes an average of 788 days—two years and two months—to get an individual 404(a) permit. *Id.* at 8. These alarming delays and extraordinary costs not only exclude all but the largest developers from the market, but also impose millions in costs on builders and individual home buyers. *See* Alvin C. Harrell, *Banking and Finance 1997: An Overview of Chartering and Regulatory Developments*, 51 Consumer Fin. L.Q. Rep. 198, 230 n.8 (1997) (explaining that "historic trends in business concentration suggest that this is a normal pattern: Increased federal regulation and enhanced regulatory enforcement mechanisms seem inevitably to drive smaller firms out of business and lead to increased concentration in the industry").

2. Inconsistency and Overly Broad Application of the Clean Water Act Costs the Economy Billions and Negatively Impacts Consumers and Home Buyers

The following simple and realistic example illustrates the costs of wetland permitting. *See* David L. Sunding, *Wetlands Protection Beyond Section 404: Economic Aspects*, SH088 A.L.I.-A.B.A. 165 (2003). Consider a 1,000-unit housing project to be built on 200 acres, 40 of which are jurisdictional wetlands, and assume that the pre-regulation marginal cost of homes in the project is a constant $200,000. *See id.* at 167. Suppose also that the pre-regulation price of the homes in the project is $250,000 and that the elasticity of demand is -1.67.

See id. Suppose that the wetlands regulation results in an out-of-pocket cost to the developer of $2,000 per home (or $2 million in total, including mitigation), reduces the project size by 100 units by placing 20 acres off-limits to development, and delays completion of the project by 2 years. *See id.* Homes in the project are now more expensive to construct and, worse, there are fewer of them, so their market price will increase. *See id.* at 168. Based on the assumptions above, the price of a home in the project will increase from $250,000 to $265,000. *See id.* But the harm from the overregulation is no simple $15,000. Consumers are harmed in that some cannot purchase homes at all due to the reduction in the size of the project, some may purchase homes but must pay a higher price, and the entire project is delayed by regulation. *See id.* The impact of this situation on developers and landowners is more complex: producers might "gain" from the increase in home prices, but they lose from the increase in costs and from the delay in completing the project and receiving their return on investment. *See id.* The total economic losses from wetland permitting is thus in the millions per year.

As this example illustrates, consumers bear the brunt of losses from wetland permitting. They are unambiguously harmed by increases in price and reductions in the number of homes available for purchase. Developers and landowners fare better because they can pass on some costs to consumers, but there can be no doubt that they suffer as well. Worse, traditional measures of the cost of regulation—namely the out-of-pocket cost of obtaining a permit and performing mitigation—are far off the mark, dramatically understating the true impacts. These hidden costs of regulation, including the costs of project delay, can be worse than the costs that show up on the balance sheet.

These burdensome costs are particularly important given the $760 billion that construction and development activity contribute to the economy on an annual basis. *See* David

Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 81 (2002). The sale price of property with federally regulated wetlands is devalued by over 10% due solely to the burdens of dealing with the federal regulatory process. *See* Randall S. Guttery, et al., *Federal Wetlands Regulation: Restrictions on the Nationwide Permit Program and the Implications for Residential Property Owners*, 37 Am. Bus. L.J. 299, 329 (2000). Significantly, this devaluation of land is also present when a property is even *likely* to be delineated as a federally protected wetland. *See id.* at 316.

3. Overly Broad Application of the Clean Water Act Harms Farmers, Ranchers, and Small Property Owners

As Congress has recognized, "efficient production and marketing of agricultural products by farmers and ranchers is of vital concern to their welfare and to the general economy of the Nation." 7 U.S.C. § 2301. Or as Senate Joint Resolution 163 declaring "National Agriculture Day" put it, "agriculture is the Nation's largest and most basic industry," provides "more jobs than any other single industry," and "is vital to maintaining the strength of our national economy." Pub. L. No. 103-223, 108 Stat. 103 (1994).

The interpretation of the CWA adopted below wreaks havoc on farmers and ranchers. There is little difference between the "unnamed ditch" the court below designated a "water of the United States," *Carabell*, 391 F.3d at 705, and the furrows and ditches common on farms and ranches across this nation. *See Webster's New International Dictionary* (William A. Nelson ed., 2d ed. 2000) (defining "furrow"). Indeed, nonnavigable, man-made drainage ditches and drains make up part of the hydrologic connection which the Sixth Circuit used to justify Amicus John Rapanos's criminal

conviction and civil liability. *See United States v. Rapanos*, 376 F.3d 629, 643 (6th Cir. 2004).

Under the interpretation presently adopted by the Fourth, Sixth, and Ninth Circuits, nearly every farm and ranch is operating in violation of the CWA and requires a costly permit. This is no mere theoretical problem. The Army Corps requires permits for certain agricultural plowing and for so-called "sidecasting," a process which involves placing excavated materials from a ditch along the side of the ditch. *See*, respectively, *Borden Ranch Partnerships v. United States Army Corps of Engineers*, 261 F.3d 810 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (per curiam), and *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000). The Army Corps even claims jurisdiction over "[a]ctivities such as walking, bicycling or driving a vehicle through a wetland." Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993). According to the government, then, some farmers and ranchers may not even walk across parts of their land and ditching without a permit from the Army Corps, risking fines and prison time if they do so.

The Corps has a track record of taking the hardest possible line against property owners. Elderly Florida resident Ocie Mills and his son were "sent to prison for depositing sand on his privately-owned wetlands that the public had decided it wanted but was unwilling to purchase." Roger Marzulla, et al., *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 Admin. L.J. Am. U. 253, 260 (1995). They each received 21 months in jail, one year of supervised release, and were fined. *See Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994). John Pozsgai was sentenced to three years imprisonment, five years probation, and fined $200,000 for placing clean fill in wetlands in Eastern Pennsylvania. *See United States v. Pozsgai*, 757 F. Supp. 21, 22 (E.D. Pa. 1991). Members of Congress described the Corps' behavior toward Mr. Pozsgai as "dictatorial" and

"Gestapo-like." Bud Shuster & Jimmy Hayes, *Big Lie on Clean Water*, Wash. Post, May 16, 1995, at A17. There are others. *See, e.g., United States v. Wilson*, 133 F 3d 251, 254 (4th Cir. 1997) (noting that James Wilson was sentenced to 21 months in prison and $1 million in fines for filling wetlands that drained to ditches, intermittent streams, and creeks).

Amicus John Rapanos is still defending himself against the government's unwarranted CWA charges in a criminal suit filed in 1993 and the government's civil suit filed in 1994. This has resulted in dozens of appeals and at least one successful petition for certiorari. *See Rapanos v. United States*, 533 U.S. 913, granting, vacating, and remanding case for reconsideration in light of *SWANCC*. At trial, Mr. Rapanos was "likened to the devil and [had] his treeless property compared to the Warsaw ghetto without Jews" while the evidence of his "guilt was far from overwhelming." *United States v. Rapanos*, 115 F.3d 367, 378 (6th Cir. 1997) (Nelson, J., dissenting). In the opinion of the trial judge in his criminal case, the government has obstinately pursued Mr. Rapanos because he is "easy to dislike" and had "the temerity to insist upon his constitutional rights." *See* Sentencing Hearing, *United States v. Rapanos*, No. 93-20023 (Mar. 15, 2005) at 8.[2] Judge Zatkoff declared that Mr. Rapanos is "exactly the person who should be protected by the Constitution," *id.* at 9. But the government presses on, even claiming that Rapanos's small discharge of sand 20 miles distant from the nearest navigable water was worse than the *Exxon-Valdez* spill, which dumped 11 million gallons of oil into Prince William Sound. *Id.* at 11.

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[2] A true and correct copy of this document is attached hereto and Amici respectfully requests that this Court take judicial notice of the comments therein.

These stories are chilling but all too common. Equally significant, the very real threat of imprisonment deters landowners from making full use of their property and coerces them to accept federal intrusions. *See* Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 Fordham Envtl. L.J. 43, 64 (1993) (describing the well-known deterrent effect of jail time for environmental "crimes" on otherwise law-abiding citizens). Few individuals are willing to risk bankruptcy and prison while spending millions of dollars on legal fees and being demonized by federal prosecutors. Property owners, having observed the fate of defendants like John Rapanos, Ocie Mills, and John Pozsgai, make the rational but rueful choice to submit to illegal demands from administrative agencies.

B. The Uncertainty and Overly Broad Application of the Clean Water Act Harms Local Governments and Invades Traditional Local Power over Land Use Planning

Home buyers, energy producers, and agricultural interests are not alone in suffering harm from the oppressive yoke of the CWA. Local governments, are also subject to the CWA's severe penalties. *See Clean Water Act Penalty Appeals*, *available at* http://www.epa.gov/eab/eabcwp.htm (last visited May 3, 2005) (showing local government as frequent defendants in CWA enforcement actions). The further the CWA is extended, regulatory burdens, costs, and delays will be added to important public works projects. EPA's heavy handed activities have "created problems of federal/state/local relationships because state and local governments have not always taken kindly to federal directions." Frank P. Grad, *Opening Note*, 25 Colum. J. Envtl. L. 213, 216 (2000).

This kind of federal control over local land use decisions marks a serious intrusion into a traditional area of state concern. *See SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water . . . ."); J. Blanding Holman, IV, *After* United States v. Lopez*: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139, 140 (1995) (noting that the CWA involves "land use regulation, an area traditionally of local concern"). Indeed, land use is widely recognized as "perhaps the quintessential local responsibility." Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 Wm. & Mary L. Rev. 1191, 1205 (2001).

State and local planners must balance a wide variety of objectives when evaluating land use decisions in order to fulfill their general goal of "enhanc[ing] the livability and character of urban areas through the encouragement of an attractive and functional mix of living, working, shopping, and recreational activities." Fla. Stat. Ann. § 187.201(15)(b)(3) (West 2005). The state must account for myriad "social, political and legal obstacles confronting the intent of private landowners, state governments, and federal regulatory agencies" in the land-use process. Eric M. Bryn, *Through a BioDiversity Looking-Glass: An Analysis of the Devils Lake Basin Water Management Plan*, 1 Great Plains Nat. Resources J. 65, 81 (1996). Amicus John Rapanos's State of Michigan has identified more than twenty objectives for land use planning. *See Michigan's Land, Michigan's Future, at* http://www.michiganlanduse.org/finalbysection.htm (last visited May 3, 2003). Through local control, communities may develop "broad goals at the state level," which "shaped locally, can result in a workable legal regime" balancing societal needs with sustainable development.

David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2366 n.457 (2003).

Displacing state authority with a burdensome federal regulatory scheme under the Clean Water Act distorts this process. It removes the state's ability to balance these complex goals and replaces it with a powerful, single-minded federal statute, backed up by the force of severe penalties. Amicus John Rapanos is facing 10-16 months *in a federal penitentiary* for filling wetlands on his private property with sand, a practice which was, for many years, encouraged as good public policy. *See* James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1, 37 (2002). Further, Mr. Rapanos was tried solely for depositing sand in the wetlands without a federal permit, not from any resulting environmental damage or impairment of navigable waters. *See United States v. Rapanos*, 190 F. Supp. 2d at 1012. Indeed, Mr. Rapanos's wetlands are some 20 miles from the nearest navigable waterway and the only basis for federal jurisdiction is a remote surface hydrologic connection. *See id.* at 1014. But the wetlands on the *Carabell* property are not even hydrologically connected to navigable waters; they are merely in the general vicinity of a ditch that is connected to a distant navigable water by a series of intermittent ditches, culverts, and streams, the majority of which are man-made. *Carabell*, 391 F.3d at 708-09 (describing the connection between a nearby ditch and, eventually, a navigable water, but finding no connection between the Carabells' wetland and the ditch). This is untenable in a federal system in which the state governments are meant to be equal. *See, e.g., M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 350-51 (1819).

The intensity of the interference with traditional local powers is matched only by its breadth. Interpreting the phrase "waters of the United States" in the Clean Water Act to include any water in the general area of a ditch with an eventual hydrologic connection to a navigable water greatly expands

federal jurisdiction and displaces state authority in one of its primary areas of responsibility. While it is unclear just how many millions of acres of wetlands exist in the United States, the number is enormous. By some estimates, there are as many as three hundred million acres of wetlands over which the Corps exercises jurisdiction. *See* Christopher J. Schulte, *Minnesota Wetland Conservation Act of 1991: "Did Minnesota Miss the Boat to Protect Artificially Created Wetlands?,"* 15 Hamline L. Rev. 439, 444 (1992) (explaining that, under the Federal Wetlands Manual operational before *SWANCC*, "the jurisdictional reach of the federal government has been estimated to have increased from the previous 105 million acres to between 200 and 300 million acres"). In Minnesota, *20%* of the state is made up of wetlands. *The Sunding Permitting Study* at 11. Alaska has an estimated 170 million acres of wetlands while Florida, Louisiana, Texas, North Carolina, Michigan, Wisconsin, and Maine contain over 5 million acres of wetlands each. *See* Royal C. Gardner, *Money for Nothing? The Rise of Wetland Fee Mitigation*, 19 Va. Envtl. L.J. 1, 19 n.99 (2000).

CONCLUSION

This case raises questions of vital importance to all sectors of society: industry, agriculture, environmentalists, property owners, and consumers. The confusion and uncertainty surrounding the permissible reach of the Clean Water Act is bad for everyone, but neither Congress, the Administration, nor the agencies charged with executing this statute can resolve the problem. Because the circuit courts are locked in an irreconcilable conflict, only this Court is capable of putting an end to the disorder. There are currently two petitions for writ of certiorari pending before this Court that address the limits of federal jurisdiction under the Clean Water Act: This case, and *Rapanos v. United States* (Docket No. 04-1034). And while there are several cases raising the same issue in the lower courts, further distillation of the issues will not aid this Court in resolving these conflicts but will only create more problems.

These cases raise an important question of law which only this Court can resolve, and it should resolve it now.

DATED: May, 2005.

Respectfully submitted,

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Attachment - 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN RAPANOS,

Defendant.
_____/

HONORABLE LAWRENCE P. ZATKOFF

No. 93-20023

SENTENCING HEARING
Tuesday, March 15, 2005

- - -

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Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

Attachment - 2

INDEX

Sentencing Hearing ..... **p. 3**

Attachment - 3

Detroit, Michigan
Tuesday, March 15, 2005
2:00 p.m.

- - -

THE COURT CLERK: Calling case number 93-20023, United States versus John Rapanos.

THE COURT: Somebody want to put their appearances on the record?

MS. PEREGORD: Jennifer Pereford on behalf of the United States.

MR. WILHELM: Thomas Wilhelm appearing on behalf of and with Mr. Rapanos.

THE COURT: Who else do we have at counsel table? It looks like we have all of the big guns here.

MR. BERG: Terrance Berg, your Honor, on behalf of the United States.

MS. PARKER: Janet Parker also on behalf of the United States, your Honor.

THE COURT: Okay. How do you wish to proceed in this matter?

MS. PEREGORD: Well, I guess I'm willing to go first, your Honor. I just have a couple brief remarks to make.

I am assuming that the Court received our post-Booker Resentencing Memorandum last Friday. We also faxed a copy of that to defense counsel and he has confirmed that he has received that.

THE COURT: I received it and reviewed it.

MS. PEREGORD: Okay. As the Court is aware, and I am just going to be briefly recapping what we said in our three

resentencing pleadings that we have filed since remand, it's the government's position that the defendant must be sentenced to a sentence within the ten to sixteen month range.

The Court of Appeals has twice affirmed the propriety of a sentence within that range. And the only two enhancements that were applied to the base offense level in this case were the lack of a permit, and as the Court knows, that was subsumed within the jury's verdict in this case, and also the fact that the wetlands filling was ongoing, an ongoing and repetitive discharge and the defendant has admitted to having done that.

THE COURT: Where did he admit that?

MS. PEREGORD: At the defendant's sentencing, initial sentencing in 1998, this is at page five of my Resentencing Memorandum which was the first pleading we filed on August 13th, at the initial sentencing of 1998 your Honor ordered a fine $185,000 stating, I'm basing that on $5,000 a day based on what was originally agreed on, agreed upon and represented to the Court by the defense that there were 37 days of filling of the actual wetlands. And that is at the sentencing transcript of December 2, 1998 at page 30.

THE COURT: Okay.

MS. PEREGORD: So based on the fact that there are no guidelines factors in this case that were not either found by the jury beyond a reasonable doubt or admitted by the defendant, we submit that even under the advisory system which is in place now post-Booker that a ten to sixteen month sentence would definitely be the reasonable sentence to impose in this case.

Thank you, your Honor.

THE COURT: Okay. Mr. Wilhelm?

MR. WILHELM: Your Honor, I disagree that the sentence of ten to sixteen months would be reasonable in this

matter. I do not believe that the Court at this time post-Booker is bound by—to follow the remand order of the Sixth Circuit Court of Appeals.

And I say that because at that point in time when they did issue the mandate or remand to this court, the guidelines were at that point thought to be mandatory and even that Court thought that they had to follow the guidelines.

Now the guidelines are only advisory, as Ms. Peregord pointed out, and they are no longer bound by the guidelines but must consider the guidelines with other special factors which I believe the Court, number one, is well aware of, and, number two, has already at some point in time considered them.

The prosecutor, in her memorandum, most recent memorandum, says that a sentence within the guideline range is not unreasonable. It is unreasonable and I believe that is what the Supreme Court, the conclusion of Supreme Court also came to when it decided Booker. It's unreasonable because it does not consider the other factors that the Court should consider in its sentencing the defendant. And those factors amount to the history and characteristics of the defendant himself.

And I believe, your Honor, that this is the time to put this case behind the Court, behind Mr. Rapanos, and sentence him to, actually, to time served or, and/or some other sentence that recognizes those characteristics of Mr. Rapanos.

Does the Court wish me to continue talking about the sentence that the Court should impose or what I believe the Court should impose?

THE COURT: Not really. I will give you an opportunity to address the Court later.

MR. WILHELM: Thank you, your Honor.

THE COURT: Mr. Rapanos, you have a right to speak in your own behalf. Is there anything you want to say?

THE DEFENDANT: Your Honor, I don't believe there were any wetlands on that property back then or even today. And in the courtroom today is Mr. Russ Harding who is the DEQ Director for the State of Michigan for over eight years and I wish you would hear from him, your Honor.

THE COURT: Mr. Wilhelm, what is that all about?

MR. WILHELM: Well, Mr. Harding has done a study, another study of the wetlands or purported wetlands on Mr. Rapanos's property and he has concluded based upon his expertise that there were no wetlands on that property.

THE COURT: We are not going to retry the facts.

WILHELM: That's what I thought. I understand that, your Honor.

THE COURT: Let me just make a statement and tell you where the Court is coming from in this case and I will give both parties an opportunity to again address the Court.

This is the oldest case in my chambers. It's the most voluminous, and we are anxious to close this case.

This case is referred to within my chambers by everybody as the "Sand Man Case" Everybody that talks about the sandman knows that we are talking about Mr. Rapanos because what he did was to move sand from one end of his property to the other end of his property. This all occurred on property he owned. Nothing was brought in to fill this land except sand that was already on that land.

Counsel for the government has pointed out in both her memo and just now in court that this Court has been reversed twice on this sentence, and that is true. And it seems to imply that I am a very light or lenient person in sentencing in criminal matters.

Well, rumor has it when I first got on this bench after the first two years that I held the record for high sentences in the Eastern District of Michigan, and that was probably true. And last week I just refused to accept a Plea Bargain Agreement entered into between the government and a defendant because, in my opinion, the sentence was too lenient. So I'm not sure the US Attorney's Office can make that case.

In this case, I granted a motion for a new trial. I have been a Judge for 27 years. And I granted a motion for a new trial approximately five times. And I can't remember ever granting one in a criminal case. So this case was very, very rare to me.

Based on the totality of all of the circumstances I did not believe that a fair trial was had in this case. I could have granted a mistrial several times during the case but I was loathe to do that as any trial Judge is because of all of the money and the preparation that goes into something like this, you want to wait and see how the case turns out and if it turns out that this was harmless error then there is no need to retry the case.

In this case, out of one out of five or maybe even less, I did believe that a mistrial and a new trial should be granted in this case. And, of course, that went up to the Court of Appeals and I was reversed again.

So you have to ask the question, what is going on in this case? Why is the government insisting that this particular defendant go to prison? I'm not really sure but I will give you my opinion on it.

First of all, my relationship with the US Attorney's Office in the Eastern District of Michigan has been excellent. You could consider me to be a cheerleader for the US Attorney's Office in the Eastern District of Michigan. I was the Chief Judge for five and a half years and I was the contact point

between the US Attorney's Office and this bench. And I've also enjoyed a very good relationship.

Being a member of the Judicial Conference of the United States and attending Chief Judges meetings around the United States I always spoken very highly of the US Attorney's Office in the Eastern District of Michigan.

As a matter of fact, as the Chief Judge, I instituted a program of publicly swearing in new assistant United States Attorneys so as to make that experience a big deal for them and their families which I believe it is. And I am hoping that the new Chief Judge will continue to do that.

As a general rule I found this Office to be reasonable, responsible, open and cooperative. There are exceptions to every rule and I am finding that this case is an exception.

So, what is going on in this case? And this is just my opinion. I'm asking myself and people are asking me, why is the government so determined to send this defendant to prison for moving his sand?

Number one—I think it's a two-prong thing—number one, this defendant is a very disagreeable person. He is rude. He is arrogant. He is obscene on occasion. He wants everything his way. He has been successful in his life and he wants everybody to know it. So he is a man who is easy to dislike.

Number two, this person who is easy to dislike had the audacity and the temerity to insist upon his constitutional rights. This all started for this individual, this legal business all started on or about August 30th, 1989, when the defendant insisted upon a search warrant before he would let anybody on his property. Prior to that date, he had been meeting with the DNR on several occasions and they were trying to work out an inspection of the property. My understanding is on that date, on August 30th, there was a meeting at his property and he had his

attorney present. And there was a confrontation between he and the DNR people. The DNR people had one view of what they wanted to do. He had another view of what he wanted to do. He turned to his lawyer and asked whether or not he had to permit the DNR to go on his property. And the lawyer said you don't have to permit them unless they have a search warrant and then he said, I'm not going to permit you unless you have a search warrant. That's when all of this started. Turned it over to the federal government, the state government.

Incidentally, the state government had prior trespasses on the defendant's property once and at least twice.

So here we have, and this is my view of what is going on, we have a very disagreeable person who insists on his constitutional rights. And this is the kind of person that the Constitution was passed to protect. He is exactly the person who should be protected by the Constitution.

People ask, well, what did this person dump to pollute the waters of the United States? Did he dump oil, radioactive substances, sewage, garbage, herbicides, pesticides, insecticides, fungicides, fertilizer, detergent, lead, iron, copper, mercury, benzene, dioxin, PCB's, PCP's, bacteria, DDT, chlordane, nitrates or cyanide? No. He didn't dump that. He polluted the waters of the United States by moving sand from one area of his property to the other.

So then they ask, well, did he dump it into the Great Lakes? No. Did he dump it into any lake? No. Did he dump it into a river? No. Did he dump it into a stream? No. Did he dump it into a pond? No. Did he dump it into waters adjacent to any of the inhabitable waters of the United States? And the answer to that is, no.

I am finding that the average US citizen is incredulous that it can be a crime for which the government demands prison for a person to move dirt or sand from one end of their property

to the other end of their property and not impact the public in any way whatsoever.

I read the government's recent Memo under date of 3-11-05. The memo, when it states that the elements of the enhancement were proved beyond a reasonable doubt to the jury or were admitted by the defendant, I do not find to be true. I don't find that to be credible. I know we have a difference of opinion on that benefit of the record in front of me. I might be wrong, but I don't think I am.

The memo speaks to increased uniformity. I agree with that. It talks about unwarranted disparities. And I agree with that. It talks about the seriousness of the offense and just punishment for that offense.

The government does not talk about the substance that was dumped, that is, sand versus toxic waste, doesn't talk about harm to the public, doesn't talk about disruption of public utilities, doesn't talk about evacuation a community, or doesn't talk about public money for clean up.

And, in my opinion, the government has failed to address similar conduct in sentencing consequences.

We have done some research about what happens to people who are accused and convicted of environmental crimes.

In Michigan, environmental defendants have rarely been sentenced to prison for their environmental crimes. Aldo Quadrini and Gaspere Vitale were sentenced to one year probation and ordered to pay $5,000 in fines and to fully restore wetlands. The two Macomb County developers were prosecuted by the Michigan Department of Environmental Quality after they clear-cut, plowed and destroyed eight acres of forested wetlands in New Baltimore, Michigan. The violations occurred between 1995 and 1999. And despite repeated warnings the defendants continued cutting and chipping trees,

removing stumps and bulldozing the site. So they received one year probation and a $5,000 fine.

In another interesting case involving corporate environmental pollution, the Department of Justice prosecuted BP Oil Company for discharging pollutants into the Delaware River in violation of the Clean Water Act. Over a six year period, BP discharged a variety of pollutants, including oil and grease. These pollutants depleted the oxygen supply in the water, making it impossible for fish to survive and reproduce. In addition, hydrocarbons present in the pollution have the potential to become concentrated in the fish. BP's violations represented a major contribution to the pollution of the river. In addition, they were committed knowingly over a period of years. Nonetheless, the Department of Justice only prosecuted BP Oil civilly. There were no criminal charges brought against them at all. Ultimately, BP Oil was fined and merely told to clean up their facility.

Perhaps the most notorious American environmental disaster of 20th Century was the Exxon Valdez oil spill of 1989 which is the same year that the defendant moved his sand. When the Exxon Valdez struck Bligh Reef in Alaska's Prince William Sound, it dumped 10.8 million gallons of crude oil in the water and created a huge oil slick killing tens of thousand of animals. That oil slick reached 1,300 miles of coastland and killed approximately 250,000 birds, 2,800 sea otters, 300 seals, and 250 bald eagles. In addition, the disaster crippled the local fishing industry.

Joseph Hazelwood was the captain of the Exxon Valdez. It was later determined that Captain Hazelwood was drunk on the night of the spill and that his negligence caused the accident. Captain Hazelwood was prosecuted and convicted of negligence in this matter. He was sentenced to serve 1,000 hours of community service over five years with no prison time or no fine.

So, do either counsel -- in addition to that, I have prepared a written Opinion that covers much of what I have stated. But I will give an opportunity at this time for either counsel to address the Court if they wish.

MS. PEREGORD: Just very briefly, your Honor. It is the government's position that the likeability or lack thereof of the defendant had absolutely nothing to do with this prosecution. Moreover, sand is more toxic and destructive to wetlands than any of the substances the Court mentioned.

THE COURT: Even the 10.8 million gallons of crude oil dumped in the waters off Alaska?

MS. PEREGORD: That is because sand totally destroys wetlands, and once wetlands are destroyed their ability to filter pollutants from reaching the water and their ability to prevent and control flooding is totally obliterated. Mr. Rapanos—

THE COURT: So let me just ask you this question.

MS. PEREGORD: Sure.

THE COURT: Where are my notes? Would it be better for him to have filled these lands with copper or lead or mercury or benzine?

MS. PEREGORD: Frankly, if the wetlands had been in existence they would have had a pretty high ability, especially at the rate of approximately 60 acres that he had on his property, to filter such toxic substances from ever reaching the water. The lack of the wetlands totally prevents such a thing.

THE COURT: I appreciate your comments. Go ahead.

MS. PEREGORD: Thank you. Mr. Rapanos was prosecuted because he refused repeatedly to apply for a permit. That is all he was asked to do. He was told by employees from

the MDNR that it was likely that he could still build the commercial shopping project that he intended to build if he would submit a permit and work around some likely fairly minor restrictions with regard to driveways and access to the property and where the commercial structure was located.

He initially agreed to apply for a permit and then after his consultant came back with a figure of 50 to 60 acres, he threatened to ruin and otherwise destroy his consultant if he did not get rid of every one of his records showing he had done work on the Salzburg Road property.

Mr. Rapanos lied to the EPA in writing when he said that no agency had ever found that there were wetlands on that property when he well knew that at that point the DNR had been out there, they had executed the search warrant, they had found a minimum of 29 acres and they had continued to attempt to get his compliance with ceasing to fill the wetlands and simply applying for a permit.

He was prosecuted because he refused to obey the law, your Honor. Plain and simple. Thank you.

THE COURT: Does the defense wish to place anything on the record?

MR. WILHELM: Your Honor, I will be very brief. The Court is aware at the initial sentencing in 1998, the Court sentenced Mr. Rapanos to a three year period of probation, fined him $185,000 and required that he do 200 hours of community service work.

Mr. Rapanos successfully completed his probationary sentence, and completed his—paid his fine and did his community service work a number of years ago. That all became resolved.

We would ask the Court to take in the factors the Court can consider now. We ask the Court to sentence him to time

served. And I think that would be a just resolution of this matter, your Honor.

THE COURT: Okay. As I indicated earlier, we have prepared a written Opinion. I have not signed it yet because I wanted to hear what counsel had to say. There may be a few minor adjustments. I anticipate that we will have that written Opinion and Order within a half hour or so.

But the sentence of this Court is going to be that the defendant be placed on probation for a period of three years. He is to perform 200 hours of community service, a fine of $185,000, special assessment of $100, all of which I understand has been satisfied. As far as I am concerned, this case is closed.

If counsel wish to wait around for the Opinion, as I indicated, it will be ready probably in thirty minutes.

Is there anything further either counsel wish to place on the record in this matter?

MS. PEREGORD: No, your Honor.

MR. WILHELM: No, your Honor.

THE COURT: Thank you.

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Attachment - 15

CERTIFICATION

I, Lawrence R. Przybysz, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/Lawrence R. Przybysz
Lawrence R. Przybysz
Official Court Reporter

3-18-05
Date

- - -

Supreme Court, U.S.
FILED
DEC - 2 2005
OFFICE OF THE CLERK

No. 04-1384

IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT FILED APRIL 11, 2005
CERTIORARI GRANTED OCTOBER 11, 2005

TABLE OF CONTENTS

Page(s)

District Court Docket Entries 1a

Circuit Court Docket Entries 13a

Michigan Department of Environmental Quality Proposal for Decision 23a

Michigan Department of Environmental Quality Final Determination and Order 50a

Comments of the Lake St. Clair Advisory Committee 60a

Comments of the U.S. Environmental Protection Agency 62a

Comments of the U.S. Fish and Wildlife Service 65a

Comments of the Macomb County Persecutor's Office, Water Quality Unit 78a

Site inspection report 81a

United States Army Corps of Engineers, Permit Evaluation 84a

Letter announcing permit denial 127a

Notification of administrative appeal options and process and request for appeal 130a

Army Corps of Engineers memorandum for Record 131a

Transcript of Administrative Appeal Hearing 135a

Page(s)

Meeting records 198a

Memorandum for administrative appeal Conference 202a

United States Army Corps of Engineers, Administrative Appeal Decision 210a

U.S. District Court
Eastern District of Michigan (Detroit)
CIVIL DOCKET FOR CASE #: 2:01-cv-72797-PDB-WC

Carabell, et al v. U S Army Corps Eng, et al
Assigned to: Judge Paul D Borman
Referred to: Honorable Wallace Capel
Demand: $0

Date Filed: 07/26/2001
Jury Demand: Plaintiff
Nature of Suit: 893 Environmental Matters
Jurisdiction: U.S. Government Defendant

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Date Filed	#	Docket Text
07/26/2001	1	COMPLAINT with attachment 1 jury demand - Receipt # 32551 - Date Fee Received: 07/26/01 (dh) (Entered: 07/27/2001)
07/31/2001	2	ORDER reassigning case from Judge George C. Steeh to Judge Paul D. Borman - Reason: disqualification of Judge (RH) (Entered: 08/01/2001)
08/17/2001	3	PROOF of mailing of complaint (ew) (Entered: 08/20/2001)
10/01/2001	4	ANSWER by Environ Protection, U S Army Corps Eng to complaint [1-1] with proof of mailing (ew) (Entered: 10/03/2001)
10/11/2001	5	ORDER by Judge Paul D. Borman, setting deadline for witness list for 2/11/02 , setting deadline for discovery for 3/11/02 , setting deadline for filing dispositive motions for 4/11/02 , setting deadline for mediation referral (if the parties stipulate) for 3/11/02 ; with proof of mailing [EOD Date 10/12/01] (kb) (Entered: 10/12/2001)
11/15/2001	6	PROOF of mailing of summons and complaint (ew) (Entered:

		11/16/2001)
12/28/2001	7	ORDER by Judge Paul D. Borman with stipulation of partial dismissal of count II, count IV, count VI, count VIII and count IX of plaintiff's complaint [EOD Date: 1/2/02] (lh) (Entered: 01/02/2002)
04/01/2002	8	ORDER by Judge Paul D. Borman with stipulation recinding scheduling order and establishing summary judgment briefing schedule: deadline for plaintiff's summary judgment motion for 4/12/02 , deadline for cross motion for 5/28/02 , setting deadline for response to summary judgment motion 6/18/02; defendants' reply due 7/9/02 [EOD Date: 4/2/02] (RH) (Entered: 04/02/2002)
04/11/2002	9	ADMINISTRATIVE record - Volume 1, Documents 1-33 (lh) (Entered: 04/11/2002)
04/11/2002	10	ADMINISTRATIVE record - Volume I, Documents 34-68 (lh) (Entered: 04/11/2002)
04/11/2002	11	ADMINISTRATIVE record - Volume I, Documents 69-90 (lh) (Entered: 04/11/2002)

04/11/2002	12	ADMINISTRATIVE record - Volume 2, Documents 1-24 (lh) (Entered: 04/11/2002)
04/11/2002	13	ADMINISTRATIVE record - Volume 3, Documents 1-21 (lh) (Entered: 04/11/2002)
04/12/2002	14	MOTION by plaintiff for summary judgment with brief, notice of hearing, and proof of mailing. (PP) (Entered: 04/15/2002)
04/16/2002	15	ORDER by Judge Paul D. Borman, referring all pretrial proceedings to Magistrate Judge Wallace Capel Jr. [EOD Date 4/18/02] (ew) (Entered: 04/18/2002)
05/31/2002	16	MOTION by defendants U S Army Corps Eng and Environ Protection for summary judgment with brief and proof of service (lh) (Entered: 06/03/2002)
06/20/2002	17	REPLY by plaintiffs to response to motion for ~~summ~~mary judgment by June Carabell, Keith Carabell, Harvey Gordenker, Frances Gordenker [14-1] with proof of service (kb) (Entered: 06/24/2002)
07/09/2002	18	ORDER by Judge Paul D.

		Borman with stipulation, extend time to 7/25/02 for defendants' reply brief [EOD Date: 7/12/02] (RH) (Entered: 07/12/2002)
07/26/2002	19	REPLY memorandum by Environ Protection, U S Army Corps Eng to response to motion for summary judgment by Environ Protection, U S Army Corps Eng [16-1] with proof of service (dh) (Entered: 07/29/2002)
08/23/2002	20	NOTICE of setting hearing on motion for summary judgment by U S Army Corps Eng, Environ Protection [16-1] and motion for summary judgment by Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [14-1] for 10:00 9/19/02 (cm) (Entered: 09/03/2002)
09/19/2002		MOTION hearing held on motion for summary judgment by U S Army Corps Eng, Environ Protection [16-1], motion for summary judgment by Frances Gordenker, Harvey Gordenker, Keith Carabell, June Carabell [14-1] - disposition: UNDER ADVISEMENT - Magistrate Judge Wallace Capel Jr. - Court Reporter: cv tapes 02-29,30,31